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No. 10-107

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IN THE

SUPREME COURT OF THE UNITED STATES

Patrizia Riccardi,

Petitioner,

V

Robert Kessler,

Respondent

On Petition For A Writ Of Certiorari

To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

There are two questions presented:

1) Whether Petitioner was denied equal protection of the law and/or due process in the form of a fair trial as a result of the Sixth Circuit's sanction of the District Court's Fed.R.Evid. 412 ruling admitting evidence of Petitioner's sexual history at trial, despite the fact that this evidence did not have probative value and would invoke gender sexual stereotypes and unfairly prejudice Petitioner whose case against Respondent included allegations of sexual harassment, retaliation, physical assault and attempted rape?

2) Did the Sixth Circuit Court of Appeals err when it issued a ruling, conflicting with other Courts of Appeals, refusing to consider Petitioner's due process denial of fair trial argument concerning District Court Judge Thomas Wiseman's conflict of interest in violation of 28 USC §455(a), because Petitioner did not raise the issue at the trial court level?

This issue is presented under circumstances where the conflict of interest existed at the time Judge Wiseman heard the action, but was never disclosed by him, and was only discovered by Petitioner after judgment was entered against her and she had submitted her appellate brief. The Sixth Circuit's ruling conflicts with decisions of other Courts of Appeals, recognizing concerns of due process and the integrity of the judiciary, allowing a party to present a due process denial of fair trial argument under analogous circumstances despite the fact that the issue was never raised to the trial court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Patrizia Riccardi, Pro Se, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Unites States Court of Appeals for the Sixth Circuit which reversed, in part, the District Court's dismissal of Petitioner's retaliation claims against Respondent is unpublished and attached as Appendix A. The Appellate Court's opinion denying Petitioner's request to supplement her appellate brief to include a constitutional due process/ denial of fair trial argument based on the newly discovered facts concerning District Court Judge Thomas Wiseman's undisclosed conflict of interest and close ties to Defendant Vanderbilt University is unpublished and attached as Appendix B.

The opinion of the District Court granting partial summary judgment to Defendants is attached as Appendix C. The opinion of the District Court granting Respondent's motion in limine to include evidence of Petitioner's sexual history at trial is attached as Appendix D.

JURISDICTION

The Court of Appeals for the 6th Circuit issued its decision on January 28, 2010. (Pet. App. A) Petitioner filed a timely petition for a writ of certiorari on April 28, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). Notice was sent pursuant to USCS Supreme Ct R 29.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part: No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . . U.S. Const. amend. XIV, § 1.

The Equal Protection Clause of Section 1 of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This Petition presents matters of general public importance in the administration of justice and the public's perception of the judiciary. Petitioner was denied due process and a fair trial because District Court Judge Thomas Wiseman should have disqualified himself from hearing the case pursuant to 28 USC §455(a) based on his and his family's close ties with Vanderbilt(Appendix E at pp. 69a-143a). Judge Wiseman did not disclose his conflict of interest at the time he heard the case and made numerous adverse rulings against Petitioner, including, but not limited to, granting partial summary judgment, ruling Petitioner's sexual history was admissible evidence, and dismissing, as a matter of law, Petitioner's retaliation claims (which were later remanded by the Sixth Circuit for a trial). (App.A at pp.17a-22a). Petitioner only discovered Judge Wiseman's conflict of interest after judgment was entered against her. The Sixth Circuit erred in refusing to allow Petitioner to supplement her brief to present the evidence of Judge Wiseman's conflict of interest so that the Court could vacate the Judgment as required on the basis that Petitioner was denied due process because of Judge Wiseman's conflict of interest.

Petitioner was also denied equal protection and/or due process and a fair trial as a result of Judge Wiseman Fed.R.Evid. 412 evidentiary ruling that evidence of her sexual history was admissible at trial. This evidence was substantially unfairly prejudicial to Petitioner who sought futily to prove at trial, among other things, that Respondent sexually harassed her, physically assaulted her and attempted to rape her, in the face of Respondent's portrayal of her as sexually promiscuous. The Sixth Circuit sanctioned the District Court's prejudicial evidentiary ruling and undisclosed conflict of interest. The District Court's conduct and prejudicial ruling so far departed

from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power.

Petitioner was the Petitioner in Civil case No 3:06-0605, filed on June 15, 2006, in the District Court of the Middle District of Tennessee against Vanderbilt University Medical Center ("Vanderbilt"), Dr. Martin Sandler
and her former supervisor, Dr. Robert Kessler ("Kessler" or "Respondent"), who is employed by Vanderbilt University. Petitioner's complaint is attached as Appendix E at pp.144a-163a. Petitioner's Complaint, filed pursuant to Title VII, Civil Rights Act of 1964 as amended, 42 U.S.C. 2000(e), and the Tennessee Human Rights Act ("THRA"), T.C.A. § 4-21-101 *et seq.*, alleged sexual harassment and/or a sexually hostile work environment, and retaliatory conduct as against the Vanderbilt, Respondent and Dr. Martin Sandler. Additionally, Petitioner alleged claims of personal injury/battery, and intentional infliction of emotional distress against Respondent for attempted rape/sexual assault occurring on June 20, 2005, and causing her imprisonment thereafter. Complaint (App. E at pp.144a-163a).

Respondent filed a Complaint against Petitioner docketed as Civil case No 3:06-0615, and the cases were consolidated. Respondent defended himself against Petitioners' claims by alleging that Petitioner falsely accused him of attempted rape and sexual harassment, and by alleging that Petitioner falsely denied having a consensual sexual relationship with him. Respondent's Complaint asserted the following claims against Petitioner: defamation, intentional infliction of emotional distress, negligent infliction of emotional distress, assault and battery, and interference with business relationships. (Respondent's Complaint, Appendix E at pp.164a-170a).

On May 30, 2007, Respondent moved for Partial Summary Judgment seeking to dismiss Petitioner's THRA retaliation claims against Respondent based upon his refusal to adequately assist Petitioner with Petitioner's grant proposals and his refusal to include Petitioner on any of his grant submissions after Petitioner made a formal sexual harassment complaint

against him. In a decision and Order dated, August 8, 2007, the District Court granted the motion, in part (Appendix C at pp. 27a-64a).

The District Court dismissed all of Petitioner's retaliation claims against Respondent except for her retaliation claims based on Respondent's refusal to include Petitioner on his Methamphetamine and Risperidone grants, finding genuine issues of material fact existed as to whether Respondent did not include Petitioner on these grant proposals in retaliation for Petitioner's sexual harassment complaint against him (Appendix C at pp. 58a-61a).

The District Court's Unfairly Prejudicial Fed.R.Evid. 412 Ruling Admitting Petitioner's Sexual History At Trial

Trial in this matter began on October 9, 2007 and ended on October 18, 2007. Judgment was entered on October 25, 2007. Prior to the trial, Petitioner made a motion in limine to exclude evidence of her sexual history at trial (App. E at pp. 171a-180a); Respondent also made an untimely motion pursuant to Fed.R.Evid. 412 to "Admit Evidence of Dr. Riccardi's *Past Sexual Behavior and Sexual Predisposition*" at trial. (App. E at pp. 181a-190a)

Respondent developed his defense and affirmative case in this matter based upon his false allegations that Petitioner had a consensual affair with him. Respondent's reasons for eliciting testimony from Petitioner about her sexual history were allegedly twofold. First, the real reason, demonstrated by the title of Respondent's Fed.R.Evid. 412 Motion (and its content) was to paint Petitioner as promiscuous. (App. E at pp.181a-190a; "Dr. Robert Kessler's Motion to Admit Evidence of Dr. Riccardi's *Past Sexual Behavior and Sexual Predisposition*"). Second, Respondent claimed that Petitioner shared with him personal information, including information about her prior relationships, and consequently, this supposedly proved that he had a consensual sexual affair with Petitioner. (*Id.*)

The District Court denied Petitioner's motion in limine to exclude the evidence and granted Respondent's untimely Rule 412 motion to admit the evidence reasoning that the testimony was probative of whether there was a sexual relationship between the parties and issues of credibility (Appendix D at pp 65a-68a).

Given a free pass by the District Court to objectify Petitioner and exploit gender sexual stereotypes in order to prejudice the jury against her, Kessler's attorney did not limit his questions to whether Petitioner shared with Respondent personal information, including information about her prior relationships. Instead, he spent a substantial amount of time asking Petitioner about her sexual history and whether she actually slept with certain men. (Appendix E at pp. 191a-199a). Therefore, the kind of information Respondent's attorney elicited from Petitioner went well beyond being probative of the type of conversations Petitioner had with Respondent. When Petitioner's (then) lawyers met with two jury members after the trial, the foreman told them that the jury believed Petitioner had sex with Respondent because if Petitioner had sex with another man she testified about, then it proved she had sex with Respondent.

On October 16, 2007, Respondent made a Rule 50 motion for a directed verdict on Petitioner's THRA retaliation claim based on Respondent's refusal to include her on his Risperidone and Methamphetamine grants. On October 17, 2007, the District Court granted that motion reasoning that Petitioner could not demonstrate under Tennessee Law that she suffered a materially adverse employment action as a result of Respondent's actions with respect to those grants and that Petitioner failed to demonstrate that Respondent's reasons for excluding Petitioner from those grant submissions were pretextual. (App. E at pp. 226a-227a). This decision was later reversed by the Sixth Circuit Court of Appeals. (Appendix A)

On October 17, 2007, Petitioner made a Rule 50 motion

for a directed verdict on Respondent's defamation claim, which was denied by Judge Wiseman. (Appendix E at pp. 200a-207a). Also, On October 17, 2007, the Jury returned a verdict in favor of Respondent on his assault, battery and defamation claims. Petitioner timely filed a renewed Rule 50 motion seeking judgment as a matter of law on Respondent's defamation claim; however, that motion was also denied by District Court Judge Wiseman. (Appendix E at pp. 208a-224a). In the alternative, Petitioner requested a remittitur of the Jury's verdict, which was granted and reduced the jury's award of compensatory damages on the defamation claim to $250,000 and the punitive damages to $250,000. (*id*).

Respondent accepted the remittitur and the District Court entered final judgment on 1/28/08 (Appendix E at pp. 225a). Petitioner timely filed a Notice of Appeal to the Sixth Circuit Court of Appeals on 2/25/08.

Petitioner's Discovery of District Court Judge Wiseman's Conflict Of Interest; And The Sixth Circuit's Denial Of Petitioner's Request To Assert A Due Process/ Denial Of Fair Trial Argument Based On The Conflict

Petitioner timely filed her appellate brief on June 5, 2008. After Petitioner filed her appeal, she discovered, through her own investigation, that District Court Judge Wiseman had a conflict of interest in violation of 28 USC §455(a), in that he and his family have close financial and personal ties to Vanderbilt University. Petitioner discovered the following facts demonstrating District Court Judge Wiseman's conflict of interest, which existed during the time he presided over Petitioner's case:

1) Judge Wiseman was an adjunct faculty member at Vanderbilt University Law School, from 1989 until 2004. (Appendix E at pp. 69a-87a).

2) In 2004, Judge Wiseman was awarded by Vanderbilt the Law School Distinguished Service Award. In receiving the

Award, Judge Wiseman stated "I am grateful to Vanderbilt for this award and for the opportunity to give back to the institution that has meant so much to me." (*Id.* at 88a-90a).

3) Additionally, Judge Wiseman's son, Thomas A. Wiseman III, who is also a graduate of Vanderbilt University, currently teaches trial advocacy at Vanderbilt University, and is an attorney at a law firm that represents Vanderbilt University. (*Id.* at pp.91a -95a).

4) Judge Wiseman is also part of the Founders Circle, which is the Vanderbilt University Law School's leadership donor society. (*Id.* at pp.96a-112a).[1]

5) Further, Judge Wiseman was awarded the 2007 Sigma Chi award. (Award recipient for Vanderbilt) (*Id.* at pp.140a-141a).

Judge Wiseman never disclosed his and his family's ties to Vanderbilt University to Petitioner so that she could seek his recusal before entry of the judgment against her. Based on Petitioner's discovery of Judge Wiseman's undisclosed conflict of interest, in July 2008, Petitioner filed a motion requesting permission from the Sixth Circuit to supplement her brief to include a constitutional due process/ denial of fair trial argument based on her discovery of Judge Wiseman's undisclosed conflict of interest. The Sixth Circuit denied Petitioner's request, and refused to vacate the judgment, reasoning that the appellate court would not consider the argument because it was not presented to the District Court first. (Appendix B at pp. 26a). However, Petitioner could not have presented the issue to the District Court prior to the final judgment because Petitioner was unaware of Judge Wiseman's conflict of interest at that time.

The Sixth Circuit's Opinion

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1 However, this affiliation is not disclosed in his financial disclosure reports 2005, 2006, 2007. Canon 5B(2) and (3) states: "A judge may attend fund-raising activities of the organization although the judge may not be a speaker, a guest of honor, or featured on the program of such an event" (Appendix E at pp. 96a-139a).

On January 28, 2010, the Sixth Circuit issued its opinion, affirming in part, and vacating in part, the judgment against Petitioner. The Sixth Circuit vacated the District Court's dismissal of Petitioner's retaliation claims based upon Respondent's refusal to include Petitioner on his Methamphetamine Grant and the Risperidone Contract. (App. A at pp.17a-22a). The Sixth Circuit ordered that the case be remanded for a new trial on these claims.

Additionally, the Sixth Circuit rejected Petitioner's argument that she was denied equal protection/due process in the form of a fair trial based on Judge Wiseman's evidentiary ruling against her admitting evidence of her sexual history at trial. (App. A at pp.12a-13a). Critically, on appeal, Petitioner urged the Sixth Circuit to find that she was denied a fair trial because Respondent was specifically permitted to ask her about her past sexual partners and whether she in fact had sexual relations with certain men. The latter issue and line of questioning is distinct from Respondent being allowed to ask Petitioner what she disclosed to Respondent, if anything, about her romantic relationships. Said differently, asking Petitioner what information she shared with Respondent about men she once dated is a far different line of questioning than asking Petitioner whether she had sexual relations with those men. Nevertheless, the Sixth Circuit sanctioned the District Court's unfairly prejudicial Fed.R.Evid. 412 ruling against Petitioner. The Sixth Circuit ruled that:

> The district court did not err in permitting testimony that Riccardi told Respondent about her prior sexual relationships. Though "evidence offered to prove" any alleged victim's "other sexual behavior" or "sexual predisposition" is generally inadmissible, the district court may allow such evidence if "its probative value substantially outweighs the danger of harm to

> any victim and of unfair prejudice to any party." Fed. R. Evid. 412(a)(1)–(2), (b)(2). Respondent's defense to Riccardi's allegations was that the two were in a consensual sexual relationship. Eliciting testimony about what Riccardi told Respondent about her past sexual relationships, then, was probative as to whether the two had the type of personal relationship in which Riccardi would disclose intimate details of her personal life. We cannot say that the district court exceeded its discretion in determining that the probative value of evidence going to the linchpin of Respondent's defense substantially outweighed the potential for unfair prejudice to Riccardi.

(App. A at pp.12a).

After the Sixth Circuit issued its mandate to the District Court to proceed with a trial on Petitioner's retaliation claims, on March 5th 2010, Petitioner filed a motion with the District Court requesting Judge Wiseman's recusal based on his undisclosed conflict of interest. On March 9, 2010, Judge Wiseman issued an order recusing himself from the case, thus confirming his conflict of interest in violation 28 U.S.C 455(a). (App. E at pp.143a).

REASONS FOR GRANTING THE PETITION

1. The Sixth Circuit's Sanction Of The District Court's Fed.R.Evid. 412 Ruling Admitting Evidence Of Petitioner's Sexual History At Trial Was Against Judicial Precedent, Violated The Purpose of Fed. R. Evid. 412, And So Far Departed From The Accepted And Usual Course Of Judicial Proceedings, As To Call For An Exercise Of This Court's Supervisory Power

Evidence of Petitioner's sexual history should have been excluded under both Fed.R.Evid. 412(a) and 412(b)(2). Pursuant to FED. R. EVID. 412(a), evidence offered to prove that an alleged victim engaged in other sexual behavior, or to prove an alleged victim's sexual predisposition, is inadmissible in any civil or criminal proceeding involving alleged sexual misconduct. Fed.R.Evid. 412(a) applied to this case because Petitioner alleged that Respondent physically attacked and attempted to rape her and sexually harassed her prior to that time. (App. E at 144a-163a). Despite Rule 412(a)'s clear cut inadmissibility rule, and Respondent's admission, as evidence by the title of his motion and its content, that he sought to introduce the evidence for the purpose of showing Petitioner's sexual predisposition, the District Court allowed the evidence to be admitted at trial and, consequently, denied Petitioner equal protection of the law and/or due process in the form of a fair trial. (App.E at pp. 181a-190a and App. D at pp. 65a-68a).

Moreover, evidence of Petitioner's sexual history should have been excluded under FED. R. EVID. 412(b)(2), which states that "evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."

Under FED. R. EVID. 412(b)(2), the evidence should have been excluded because there was no probative value in asking Petitioner whether she had sexual relations with certain men.

See Socks-Brunot v.Hirschvogel Inc., 1999 U.S. Dist. LEXIS 626 *10-11 (S.D. Ohio Jan. 21, 1999) (whether woman entered into consensual sexual relationships with anyone else is not probative of whether she consented to a sexual relationship with accused harasser.)

Far beyond the type of evidence the Sixth Circuit found to be probative, (i.e., what Petitioner told Respondent about her past sexual relationships was probative as to whether the two had the type of personal relationship in which Petitioner would disclose intimate details of her personal life), the District Court allowed the Respondent to ask Petitioner about her sexual history and whether she actually slept with certain men. (App. E at pp. 191a-199a). Asking Petitioner what information she shared with Respondent about her past relationships, if any, is a far different line of questioning than asking Petitioner whether she had sexual relations with those men. The District Court should have shielded Petitioner from the prejudice and embarrassment of having to disclose details of her sexual history since this information was not probative of whether Petitioner had a sexual relationship with Respondent.

Furthermore, the evidence should have been excluded under FED. R. EVID. 412(b)(2), because the unfair prejudice (i.e., gender sexual stereotyping) that resulted to Petitioner from this testimony substantially outweighed any probative value and the result was the denial of due process to Petitioner.

In *Socks-Brunot v.Hirschvogel Inc.*, 1999 U.S. Dist. LEXIS 626 *10 (S.D. Ohio Jan. 21, 1999), the court explained that "[w]hile relevant evidence is generally admissible under Federal Rule of Evidence 403, evidence subject to Rule 412 is **presumptively inadmissible**, even when offered to disprove 'unwelcomeness' in a sexual harassment case." *Id.* at *15 (emphasis added). The court stated the following:

> The defendant may not offer evidence that the employee had engaged in sexual conduct with

> other co-workers or supervisors. Such evidence is both intrusive and, as importantly, without any relevance. Employees are free to engage or not engage in amorous conduct with co-workers. The fact that an employee entered into a consensual relationship with one co-worker or supervisor does not mean that he or she has invited *quid pro quo* demands from a supervisor. That Federal Rule of Evidence 412 prohibits such testimony is beyond debate. *Id.* at *10-11.

In *Socks-Brunot*, the court imposed the remedy of granting Petitioner a new trial because the "inadmissible evidence combined with the highly prejudicial content of the testimony convince[d] the court that the Petitioner was denied a fair trial." *Id.* This case is analogous to *Socks-Brunot*, and the Sixth Circuit erred in failing to vacate the judgment on the basis that Petitioner was denied a fair trial because the jury was prejudiced against Petitioner by the evidence of her sexual history.

Countless other courts have also held that Fed.R.Evid. 412 shields a Petitioner in a sexual harassment case from the prejudice and embarrassment that would result from disclosing facts about her sexual history and/or conduct. *See e.g. Holt v. Welch Allyn, Inc.*, 2000 WL 98118 (N.D. N.Y. January 11, 2000) (in Title VII sexual harassment case, court held that evidence governed by Rule 412 regarding evidence of nonwork-related sexual conduct was inadmissible); *Williams v. Bd. of County Commissioners*, 192 F.R.D. 698, 704 (D. Kan. 2000) (in sexual harassment lawsuit, Petitioner not required to answer interrogatory seeking information about sexually transmitted diseases, the age at which she first had intercourse and the names and addresses of those persons with whom she had been sexually active within the last five years; court found that

marginal relevance of information sought was outweighed by potential harm to Petitioner including unjustified invasion of privacy, potential for public and private embarrassment and likelihood of significant prejudice based on improper sexual stereotyping); *Howard v. Historic Tours of America*, 177 F.R.D. 48, 51 (D. D.C. 1997) (Petitioner in sexual harassment action was not compelled to answer interrogatory asking whether she had sexual relationships with employees not named as harassers; court stated that "[o]ne of the purposes of Fed.R.Evid. 412 was to reduce the inhibition women felt about pressing complaints concerning sexual harassment because of the shame and embarrassment of opening the door to an inquiry into the victim's sexual history. This shame and embarrassment . . . exists equally at the discovery stage as at trial and is not relieved by knowledge that the information is merely sealed from public viewing"); *Priest v Rotary,* 98 FRD 755 (ND Cal 1983)(in Title VII sexual harassment case, information sought by the employer regarding the waitress' past sexual behavior was not discoverable and noting that a Petitioner's past sexual behavior was more often harassing and intimidating than genuinely probative and that the potential for prejudice outweighed whatever probative value such evidence might have; thus, the court concluded that in civil suits for sexual harassment, and absent extraordinary circumstances, inquiry into such areas should not be permitted either in discovery or at trial); *E.E.O.C. v. Danka Industries, Inc.,* 990 F. Supp. 1138 (E.D. Mo. 1997)(information regarding employee's past sexual history with persons not employed by defendant employer was not discoverable in Title VII sexual harassment action); *Mitchell v Hutchings,* 116 FRD 481(DC Utah 1987)(Evidence sought by defendants in Title VII sexual harassment action was not admissible "habit" evidence, but inadmissible character evidence, where, because amenability of Petitioners to sexual advances from other than coworkers is irrelevant to proscribed sexual harassment, evidence would constitute wholesale inquiry into past sexual conduct.) *See also United States v Ramone*, 218 F3d 1229 (10th Cir, 2000), *cert. den.*, 531 US 1026 (2000) (excluding sexual conduct evidence because any limited probative value was outweighed by prejudice, confusion, and

potential for misleading jury, since it likely would have focused jury's attention on victim's prior unusual sexual practices rather than on crucial issue of whether Petitioner consented to sexual activity on night in question).

Consequently, the Sixth Circuit's sanction of the District Court's prejudicial Fed.R.Evid. 412 ruling, which was against judicial precedent, and violated the purpose of Fed.R.Evid. 412,[2] and was so far departed from the accepted and usual course of judicial proceedings, warrants the granting of this Petition for this Court to exercise its supervisory power.

Moreover, the Sixth Circuit's ruling creates a dangerous precedent which will be used by savy defendants and their attorneys against women pursuing sexual harassment and retaliation claims. Based on the lower courts' rulings, a defendant need only concoct a story that the woman accusing him of sexual harassment told him that she had relationships with other men in order to receive from the court a free pass at trial to ask the woman specific details about her sexual experiences and or conduct. This free pass is a one-way ticket to a defense verdict and a substantial set-back to the women's movement, the purpose behind Federal Rule 412, and rape shield laws across the country. Consequently, for this reason of national significance, the Petition should be granted.

2. The Sixth Circuit's Ruling Denying Petitioner's Request To Present A Due Process Denial Of Fair Trial Argument Based On District Court Judge Wiseman's Undisclosed Conflict of Interest In Violation of 28 USC §455(a) Presents The Court With An Opportunity To Resolve A Conflict Among The Circuit Courts Of Appeals On An Important Federal Question, And Presents An Issue Of General Public Importance In The Administration

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2 The court in *Socks-Brunot* noted that the former Rule 412 "was designed to protect rape victims from intrusive and prejudicial questioning as to other sexual conduct or predisposition in the course of a criminal trial or hearing," (1999 U.S. Dist. LEXIS 626 at *7), and that the current Rule 412 "applies the same logic to civil lawsuits involving claims of 'sexual misconduct'." *Id.* at *8.

Of Justice And The Public's Perception Of The Judiciary Calling For An Exercise of This Court's Supervisory Powers

This Petition should be granted because it affords the Supreme Court the opportunity to resolve a conflict among the Circuit Courts of Appeals as to whether an appellate court can exercise original jurisdiction to decide whether a District Court Judge has violated 28 USC §455(a), and whether the violation warrants the remedy of vacating the judgment, under circumstances where the District Court judge did not disclose the conflict of interest and it was not discovered until after judgment was entered.

Additionally, this Petition should be granted because it presents an issue of general public importance in the administration of justice and the public's perception of the integrity of the judiciary.

Finally, this Petition should be granted because by refusing to consider whether Judge Wiseman violated 28 USC §455(a), and whether the violation warranted the remedy of vacating the judgment, the Sixth Circuit sanctioned the District Court's unlawful conduct which so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power.

Other Courts Of Appeals Have Exercised Original Jurisdiction To Oversee The Administration Of Justice And Ensure Due Process

The Sixth Circuit erred in denying Petitioner's request for it to consider evidence of Judge Wiseman's conflict of interest in violation of 28 USC §455(a) and Petitioner's due process denial of fair trial argument. The Sixth Circuit should have addressed this issue and vacated the judgment against Petitioner despite the fact that Petitioner did not have an opportunity to present the issue to the District Court prior to final judgment. Petitioner did not have this opportunity because she only discovered Judge

Wiseman's conflict of interest after final judgment was entered against her.

The Sixth Circuit's ruling conflicts with other Courts of Appeals' decisions holding that the failure to move for recusal at the trial level does not preclude raising the issue on appeal. *See Noli v. Commissioner*, 860 F.2d 1521, 1528 (9th Cir. 1988) (failure to move for recusal at the trial level does not preclude raising on appeal the issue of recusal under 28 U.S.C. §455); *Mixon v United States*, 620 F.2d 486 (5th Cir. 1980) (vacating judgment and remanding case where the magistrate who determined petition was automatically disqualified under *28 USCS § 455*, even though disqualification was neither noticed by magistrate nor called to his attention by counsel.")

In an analogous case, where the trial court judge should have recused himself pursuant to 28 USCS § 455, but did not, and the conflict went undisclosed until the time of appeal, the Fifth Circuit addressed the conflict issue for the first time on appeal and vacated the judgment even though the conflict of interest issue was never raised at the trial level. *See Mixon v United States*, 620 F.2d 486 (5th Cir. 1980).

The *Noli* and *Mixon* decisions demonstrate that especially where, as here, a party does not know of the existence of a judge's conflict of interest until after final judgment is entered, the appellate court should have the authority to exercise original jurisdiction to oversee the administration of justice and ensure due process is afforded to all litigants.
Consequently, the Supreme Court should grant this Petition in order to resolve the conflict amongst the Courts of Appeals on this important federal due process issue.

The Appropriate Remedy For The District Court's Violation Of 28 U.S.C. § 455(a) Is to Vacate The Judgment

Had the Sixth Circuit considered Petitioner's argument concerning Judge Wiseman's disqualification under 28 USC § 455, the circumstances here would have required the Sixth

Circuit to find a violation of that statute and to vacate the judgment.

28 USC § 455 defines the circumstances that mandate the disqualification of federal judges, and, in particular, 28 USC § 455(a) disqualifies a federal judge from acting in any proceeding in which the judge's impartiality "might reasonably be questioned." *See* 28 USC § 455(a). "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg v. Health Services Aqusitions Corp.*, 486 U.S. 847, 865 (1988) (affirming decision to vacate judgment pursuant to Fed.R.Civ.P. 60(b)(6), even under circumstances where the district court judge was unaware of his conflict of interest, because a violation of § 455(a) does not depend upon whether the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that the judge knew of the facts). *See also United States v. Balistrieri*, 779 F.2d 1191 (7th Cir. 1985) (Section 455(a) "is directed against the appearance of partiality, whether or not the judge is actually biased."); *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989) ("Section 455(a) of the Judicial Code, is not intended to protect litigants from actual bias in their judge but rather to promote public confidence in the impartiality of the judicial process."); *United States v Gigax*, 605 F2d 507 (10th Cir. 1979)(in determining whether a judge should recuse under 28 USCS § 455(a), issue is not whether judge is impartial in fact, but rather whether reasonable man might question impartiality under all circumstances); *Levine v. United States*, 362 U.S. 610 (1960) ("justice must satisfy the appearance of justice").

Courts have recognized that because the touchstone of recusal is the integrity of the judiciary, prejudice is presumed once the appearance of partiality is shown.

Judge Wiseman Violated 28 USC § 455(a) By Failing To Recuse Himself

Judge Wiseman's close ties with Defendant Vanderbilt mandated his disqualification from this case because his

"impartiality might reasonably be questioned". *See* 28 USC § 455(a). Any objective member of the public would have reasonably believe that Judge Wiseman was aware of his and his family's close ties to Vanderbilt at the time he presided over the case. Further, any objective member of the public would have questioned Judge Wiseman's impartiality as a result of the fact that Vanderbilt was a Defendant in the case and Defendant Respondent, is a world renowned scientist employed by Vanderbilt. *See Liljeberg*, 486 U.S. at 868-869.

Judge Wiseman violated 28 USC § 455(a) by failing to disclose his close ties to Vanderbilt University and failing to recuse himself as required by 28 USC § 455. *See Liteky v United States*, 510 US 540 (1994) (28 USCS § 455 places an obligation upon judges to identify the existence of bias or prejudice grounds of recusal, rather than requiring recusal only in response to party affidavit); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101 (5th Cir. 1980) (vacating judgment in Petitioner's favor, ordering new trial before new judge and jury, and finding that 28 U.S.C. 455 required the judge to recuse himself where the judge's father was a senior partner in Petitioner's attorney's law firm, thus presenting a situation in which the judge's impartiality might be questioned), *cert. denied*, 449 U.S. 820 (1980); *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989)(Section 455(a) "requires a judge to recuse himself in any proceeding in which his impartiality might reasonably be questioned."); *Obert v Republic W. Ins. Co.*, 190 F. Supp. 2d 279 (DC RI 2002), modified, 398 F.3d 138 (1st Cir. 2005) (violation of 28 USC § 455(a) requires a judge's sua sponte recusal because it is the judge's duty to ensure that his or her presence does not taint the process of justice or integrity of United States Courts); *In re Kensington Int'l, Ltd.*, 368 F3d 289 (3rd Cir. 2004) (Test for recusal under *28* USCS § 455(a) is whether reasonable person, with knowledge of all facts, would conclude that judge's impartiality might reasonably be questioned.)

Judge Wiseman's Undisclosed Conflict Prejudiced Petitioner And Resulted In The Denial Of A Fair Trial; Therefore, The Judgment Against Petitioner Should Be Vacated

Pursuant To Federal Rule of Civil Procedure 60(b)(6)

If Judge Wiseman would have disclosed his close relationship with Vanderbilt, Petitioner would have sought his recusal prior to entry of judgment against her. Judge Wiseman's failure to disclose the conflict deprived Petitioner of due process and the opportunity for a fair trial. *See United States v. Sciuto*, 521 F.2d 842, 845 (7th Cir. 1996) ("The right to a tribunal free from bias or prejudice is based on the Due Process Clause.").

Federal Rule of Civil Procedure 60(b) provides a procedure whereby, in appropriate cases such as this, a party may be relieved of a final judgment. In particular, Rule 60(b)(6) grants federal courts broad authority to relieve a party from a final judgment "upon such terms as are just," provided that the motion is made within a reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5).

Fed.R.Civ.P. 60(b) does not particularize the factors that justify vacating a final judgment, however, this Court has explained that the Rule provides courts with authority "adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice," while also cautioning that it should only be applied in "extraordinary circumstances." *See Liljeberg*, 486 U.S. 847, 864 (1988), *citing*, *Klapprott v. United States*, 335 U.S. 601, 614-615 (1949) and *Ackermann v. United States*, *340 U.S. 193* (1950).

Several courts have held that extraordinary circumstances sufficient to warrant Rule 60(b)(6) relief from a final judgment are presented where, as here, a district court judge is disqualified from hearing a case pursuant to 28 USC § 455(a), based on a conflict of interest which existed at the time the judge heard the action, but was never disclosed by the judge and was only discovered after judgment was entered. *See Liljeberg v. Health Services Aqusitions Corp.*, 486 U.S. 847 (1988) (affirming decision to vacate judgment pursuant to Rule 60(b)(6), because of the district court judge's undisclosed conflict

of interest, which was only discovered after final judgment was entered); *Wheeler v. McDonough*, 210 Fed. Appx. 988 (11th Cir Dec. 19, 2006) (reversing the district court's denial of Wheeler's Rule 60(b)(6) motion to vacate based on the district court's judge's conflict of interest, and ordering that Wheeler's petition be reinstated *nunc pro tunc* as of the date of its original filing; and that it be assigned to a different district court judge); *Russell v. Lane*, 890 F.2d 947, 949 (7th Cir. 1989)(Rule 60(b)(6) could be used in appropriate cases to vacate orders made by a judge who later recused himself, if the ground for recusal existed at the time those orders were made).

In *Liljeberg,* this Court set forth factors to be considered in determining whether a final judgment should be vacated for a violation of 28 USC § 455(a). *See Liljeberg*, 486 U.S. at 864. The Court explained that it is appropriate to consider: (1) the risk of injustice to the parties in the particular case; (2) the risk that the denial of relief will produce injustice in other cases; and (3) the risk of undermining the public's confidence in the judicial process. *Id.* The Court further cautioned that "[w]e must continuously bear in mind that 'to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Id., citing*, *In re Murchison*, 349 U.S. 133, 136 (1955).

As in *Liljeberg,* these factors warrant granting the Rule 60(b)(6) motion and vacating the judgment in this case. *See Liljeberg*, 486 U.S. 847, 868-869. First, there is a greater risk of unfairness to Petitioner in upholding the judgment in favor of Respondent than there is in allowing a new judge to take a fresh look at the issues. *Id.* at 868. Judge Wiseman's bias in favor of Vanderbilt, and Respondent Kessler, an employee of Vanderbilt, must be presumed based on his conflict of interest and close ties to the school. This presumption alone warrants the vacatur of the judgment.

Additionally, Judge Wiseman's actual bias was demonstrated by the fact that he threw out all of Petitioner's claims as a matter of law, except for Petitioner's battery claim, when he should not have ruled on the case at all. *See Russell v.*

Lane, 890 F.2d 947, 949 (vacating judgment where two-thirds of Petitioner's case was thrown out in the most summary fashion possible by a judge who should have not ruled on the case at all due to his conflict of interest).

Judge Wiseman's bias was also exhibited by his prejudicial evidentiary rulings, including, but not limited to, his Fed. R. Evid. 412 decision to permit Respondent to question Petitioner about her sexual history at trial, which was in conflict with judicial precedent and resulted in unfair prejudice to Petitioner at trial, denying her due process right to a fair trial.

Judge Wiseman's bias was further established by virtue of the fact that the Sixth Circuit overruled his judgment in favor of Respondent on Petitioner's retaliation claims concerning the Risperidone and Methamphetamine grants.

Moreover, Judge Wiseman's failure to disclose his close ties with Vanderbilt denied Petitioner justice and prevented her from seeking his recusal prior to final judgment. *See Liljeberg*, 486 U.S. 847, 868-869 (noting that district court judge's silence about conflict of interest, that he should have known about and should have disclosed, deprived the Defendant of a basis for making a timely motion for a new trial, and was a reason to vacate the judgment.)

Also, as this Court reasoned in *Liljeberg*, providing relief in cases such as this will not produce injustice in other cases; to the contrary, vacating the judgment pursuant to Rule 60(b)(6) and enforcing § 455 may prevent a substantive injustice in some future case by encouraging a judge to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered. It is therefore appropriate to vacate the judgment. *See Liljeberg*, 486 U.S. at 868.

Additionally, under the facts presented here, the risk of undermining the public's confidence in the judicial process is high if the judgment is not vacated. Judge Wiseman's violation of 28 USC § 455(a) is neither insubstantial nor excusable. Any

objective member of the public would reasonably believe that Judge Wiseman was aware of his close ties to Vanderbilt at the time he presided over the case. Further, any objective member of the public would have questioned Judge Wiseman's impartiality as a result of his close ties to Vanderbilt. *See Liljeberg*, 486 U.S. at 868-869. Judge Wiseman's failure to recuse himself was inexcusable, and a failure to vacate the judgment would further risk undermining the public's confidence in the judicial process. *See Liljeberg*, 486 U.S. at 868-869.

Finally, under these circumstances, Petitioner, proceeding pro se, has satisfied the requirements of Fed.R.Civ.P. 60(b)(6), by seeking to vacate the judgment in a "reasonable time." Petitioner only discovered Judge Wiseman's close ties with Vanderbilt after judgment was entered against her and after she submitted her appellate brief to the Sixth Circuit. Petitioner immediately requested the Sixth Circuit to consider this issue and vacate the judgment, however, the Sixth Circuit refused. Thus, under these circumstances, the Petition should be granted and judgment vacated.

CONCLUSION

For all the above stated reasons, Petitioner respectfully requests the Court to grant her Petition for a Writ of Certiorari.

Respectfully submitted,

Patrizia Riccardi, Pro Se